

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SHANNON RAY, KHALA TAYLOR,
PETERROBINSON, KATHERINE
SEBBANE, and RUDY BARAJAS,
individually and on behalf of all those
similarly situated,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION,

Defendant.

Case No. 1:23-cv-00425 WBS CSK

ORDER RE: PLAINTIFFS' MOTION TO
COMPEL
(ECF No. 129)

Pending before the Court is a motion to compel filed by Plaintiffs Shannon Ray, Khala Taylor, Peter Robinson, Katherine Sebbane, and Rudy Barajas.¹ (ECF No. 129.) Plaintiffs seek to compel Defendant National Collegiate Athletic Association (NCAA) to disclose one sentence redacted in a document and compel further responses to Plaintiffs' Requests for Admission (RFA) numbers 3, 5, and 6. A hearing was held on April 8, 2025, with counsel Dennis Stewart appearing for Plaintiffs and counsel Justin

¹ This matter proceeds before the undersigned pursuant to 28 U.S.C. § 636, Fed. R. Civ. P. 72, and Local Rule 302(c). Joseph Colon is no longer a named plaintiff in this action (see Second Am. Compl. (ECF No. 84)), and the Clerk's Office is directed to update the short case title in the docket to *Ray, et al. v. NCAA*.

1 Raphael appearing for Defendant. For the reasons that follow, the Court DENIES
2 Plaintiffs' motion to compel.

3 **I. BACKGROUND**

4 In this antitrust action, Plaintiffs allege violation of Section 1 of the Sherman
5 Antitrust Act, 15 U.S.C. § 1, based on NCAA Division I Bylaw 11.01.06 regarding
6 compensation for assistant coaches, which the parties refer to as the "Volunteer Coach
7 Rule." See Second Am. Compl. The district court recently certified the class of "[a]ll
8 persons who, from March 17, 2019, to June 30, 2023, worked for an NCAA Division I
9 sports program other than baseball in the position of "volunteer coach," as designated by
10 NCAA Bylaws." 3/10/2025 Order (ECF No. 128). Plaintiffs were appointed as class
11 representatives. *Id.* The relevant background for the discovery dispute currently at issue
12 is provided in the discussion below.

13 **II. DISCUSSION**

14 **A. Legal Standards**

15 "Parties may obtain discovery regarding any nonprivileged matter that is relevant
16 to any party's claim or defense and proportional to the needs of the case[.]" Fed. R. Civ.
17 P. 26(b)(1). "[B]road discretion is vested in the trial court to permit or deny discovery."
18 *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002).

19 A party may serve requests for admission on any matters within the scope of Rule
20 26(b)(1) relating to "facts, the application of law to fact, or opinions about either"; and
21 "the genuineness of any described documents." Fed. R. Civ. P. 36(a)(1). A matter is
22 deemed admitted unless a written answer or objection is served within thirty (30) days,
23 unless otherwise agreed upon or ordered, after the requests were served. Fed. R. Civ.
24 P. 36(a)(3).

25 A party may move to compel discovery if the movant has in good faith conferred
26 with the party opposing discovery to obtain the requested discovery without the court's
27 intervention. See Fed. R. Civ. P. 37(a)(1). The moving party bears the burden to "inform
28 the Court which discovery requests are the subject of the motion to compel, and, for

1 each disputed response, why the information sought is relevant and why the responding
2 party's objections are not meritorious." *Adams v. Yates*, 2013 WL 5924983, at *1 (E.D.
3 Cal. Nov. 1, 2013). Local Rule 251 governs motions to compel and requires the parties
4 to confer and attempt to resolve their discovery differences.

5 **B. January 12, 2023 Talking Points Document**

6 In discovery, the NCAA produced a January 12, 2023 Talking Points document.
7 The NCAA initially produced this document unredacted, then clawed it back based on
8 attorney-client privilege and produced a redacted version with one sentence redacted.²
9 This document was prepared by Jenn Fraser, NCAA's Vice President of Division I
10 Governance, for Lynda Tealer, then chair of the NCAA Division I Council and
11 representative for the University of Florida, a Division I school. Ms. Fraser and Ms.
12 Tealer are not attorneys. At Ms. Fraser's deposition, she testified that the document was
13 prepared for Ms. Tealer's use in Ms. Tealer's report to the NCAA board of directors.
14 Jenn Fraser Dep. 220:24-221:23, Joint Disco. Stmt, Exh. 4 (ECF No. 129-6). She further
15 testified that the redacted sentence summarized legal advice the NCAA received from
16 outside counsel at Cleary Gottlieb. *Id.* at 265:9-266:9. Based on Ms. Fraser's unrebuted
17 testimony, this sentence represents privileged attorney-client communications. See
18 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). The fact that Ms. Fraser also
19 testified that she did not consult with an attorney when drafting the Talking Points
20 document and that she did not intend Ms. Tealer to use the document to convey or
21 provide legal opinions or advice, does not alter the Court's finding.³ Therefore, this
22 sentence was properly redacted. In addition, Plaintiffs' evidentiary arguments regarding
23 Ms. Fraser's personal knowledge and foundation fail here as they go towards

24 _____
25 ² As stated at the hearing, the Court declines to address other documents referenced
26 by Plaintiffs in the Joint Discovery Statement that are not the subject of this motion to
compel. See Joint Disco. Stmt at 4-5.

27 ³ At the hearing, Plaintiffs' counsel requested an in-camera review of the Talking Points
28 document. Given that this issue was not raised in the Joint Discovery Statement as
required and was raised for the first time at the hearing, the Court declined this request.

1 admissibility, not the determination of whether the material is privileged and if so,
2 whether the privilege has been waived.

3 Plaintiffs do not contend that the NCAA expressly waived its privilege. See Joint
4 Disco. Stmt. Instead, Plaintiffs argue that if the redacted sentence is privileged, the
5 NCAA has implicitly waived its privilege. The Court addresses Plaintiffs' argument
6 regarding implied waiver of the attorney-client privilege below.

7 **C. Plaintiffs' Requests for Admission Nos. 3, 5, and 6**

8 Plaintiffs served seven RFAs on the NCAA, and move to compel further
9 responses as to RFA Nos. 3, 5, and 6, which are reproduced below.

10 **1. RFA No. 3**

11 Plaintiffs' RFA Nos. 3 asks whether the NCAA considered outside legal counsel's
12 advice "regarding the legality of the Volunteer Coach Rule under antitrust laws" in
13 recommending the repeal of the rule. After raising objections, the NCAA admitted RFA
14 No. 3 in part. In addition, the NCAA admitted Plaintiffs' RFA No. 2, which asks whether
15 outside counsel communicated legal advice "regarding the legality of that rule under the
16 antitrust laws." Though RFA No. 2 is not at issue, it is also reproduced below as relevant.

17 **PLAINTIFFS' REQUEST NO. 2:**

18 Prior to the repeal of the Volunteer Coach Rule, legal advice
19 from outside counsel to the NCAA was communicated
20 directly or indirectly to one or more NCAA Committees and
some Division I member schools regarding the legality of that
rule under the antitrust laws.

21 **DEFENDANT'S RESPONSE TO REQUEST NO. 2:**

22 *The NCAA admits the request for admission No. 2.*

23
24 **PLAINTIFFS' REQUEST NO. 3:**

25 One of the factors one or more NCAA Committees
26 considered in 2022-23 when recommending the repeal of the
Volunteer Coach Rule was the advice of outside legal
27 counsel regarding the legality of the Volunteer Coach Rule
under antitrust laws.

1 **DEFENDANT'S RESPONSE TO REQUEST NO. 3:**

2 The NCAA objects to this request to the extent it seeks
3 protected attorney client privileged communications. The
4 NCAA objects to this request for admission as vague and
5 ambiguous. The NCAA Committees and Division I Council
6 considered a number of proposals in 2022-23 that came from
7 the Modernization of Rules Subcommittee, among other
8 sources, including the Volunteer Coach Rule. Given these
9 objections, including that the request seeks information
10 regarding the content of attorney client privileged
11 communications by and with the NCAA's counsel, the NCAA
12 cannot admit or deny the request as framed. *The NCAA does
13 admit that one or more NCAA Committees that ultimately
14 voted in favor of, or recommended, a package of legislative
15 reforms that included the repeal of the volunteer coach
16 designation bylaw, received advice of outside legal counsel
17 regarding antitrust law.*

18 Def. RFA (Set One) Responses, Joint Disco. Stmt, Exh. 5 (ECF No. 129-7) (emphasis
19 added).

20 At the hearing, the Court asked Plaintiffs why a further response was needed for
21 RFA No. 3 given the NCAA's partial admission to RFA No. 3 and its admission to RFA
22 No. 2. Plaintiffs agreed that a further response from the NCAA to RFA No. 3 was not
23 necessary. Therefore, this issue is now moot, and the motion to compel is denied as to
24 RFA No. 3 as moot.

25 **2. RFA Nos 5 and 6**

26 Plaintiffs' RFA Nos. 5 and 6 ask whether the Volunteer Coach Rule was repealed
27 in part because of the NCAA's "concern[] that the Volunteer Coach Rule may violate
28 antitrust laws." Unlike RFA Nos. 2 and 3, the NCAA did not admit any portion of RFA No.
5 or No. 6. Instead, the NCAA denied both RFAs as seeking the content of privileged
attorney-client communication.

29 **PLAINTIFFS' REQUEST NO. 5:**

30 The NCAA's Division I Transformation Committee
31 recommended the repeal of the Volunteer Coach Rule, at
32 least in part, because it was concerned that the Volunteer
33 Coach Rule may violate antitrust laws.

1 **DEFENDANT'S RESPONSE TO REQUEST NO. 5:**

2 The NCAA objects to this request for admission as vague and
3 ambiguous in that it does not define what it means by the
4 "Volunteer Coach Rule." The NCAA objects to this request to
5 the extent it seeks protected attorney client privileged
6 communications. The NCAA cannot respond to this request
7 because it seeks information regarding the content of
8 attorney client privileged communications by and with the
9 NCAA's counsel and for that reason, denies request for
10 admission no. 5.

11 **PLAINTIFFS' REQUEST NO. 6:**

12 One of the reason why the Volunteer Coach Rule was
13 repealed in 2023 was because of the concern that the
14 Volunteer Coach Rule may violate antitrust laws.

15 **RESPONSE TO REQUEST NO. 6:**

16 The NCAA objects to this request for admission as vague and
17 ambiguous in that it does not define what it means by the
18 "Volunteer Coach Rule." The NCAA objects to this request to
19 the extent it seeks protected attorney client privileged
20 communications. The NCAA cannot respond to this request
21 because it seeks information regarding the content of
22 attorney client privileged communications by and with the
23 NCAA's counsel and for that reason, denies request for
24 admission no. 6.

25 Def. RFA (Set One) Responses, Joint Disco. Stmt, Exh. 5.

26 At the outset, the Court rejects the NCAA's vague and ambiguous objection. The
27 NCAA clearly understands what the "Volunteer Coach Rule" is referring to given its
28 admission to RFA No. 2, which uses the same phrase and to which the NCAA did not
object. The Court focuses its analysis, as do the parties, on the attorney-client privilege
issue.

29 Plaintiffs first argue that it is not seeking privileged information because its RFAs
30 seek the business rationale for the NCAA's repeal of the Volunteer Coach Rule. This
31 argument fails, however, because RFAs Nos. 5 and 6 do not ask about business
32 reasons. In addition, it is important to note the context of RFAs Nos. 5 and 6, which

1 follow RFA No. 2 (whether outside counsel communicated legal advice to the NCAA
2 “regarding the legality of that rule under the antitrust laws”) and RFA Nos. 3 (whether the
3 NCAA considered outside legal counsel’s advice “regarding the legality of the Volunteer
4 Coach Rule under antitrust laws” in recommending the repeal of the rule). The Court
5 concludes that RFA Nos. 5 and 6 seek the content of privileged attorney-client
6 communications.

7 Plaintiffs next argue that the NCAA should be compelled to further respond
8 because even if such information is privileged, the NCAA implicitly waived its privilege by
9 putting its state of mind at issue when it asserted pro-competitive reasons.⁴ The NCAA
10 responds that it has not put its privileged communications at issue, which is a required
11 element for implied waiver of the attorney-client privilege. The Court agrees with the
12 NCAA.

13 In the Ninth Circuit, implied waiver of the attorney-client privilege “is based on the
14 rule that ‘a litigant waives the attorney-client privilege by putting the lawyer’s
15 performance at issue during the course of litigation.’” *United States v. Sanmina Corp.*,
16 968 F.3d 1107, 1117 (9th Cir. 2020) (quoting *Bittaker v. Woodford*, 331 F.3d 715, 719
17 (9th Cir. 2003) (citation omitted)). Some courts analyze implied waiver through a three-
18 element test as presented by the parties here, *see* Joint Disco. Stmt at 12: (1) “whether
19 the party is asserting the privilege as the result of some affirmative act, such as filing
20 suit”; (2) “whether through this affirmative act, the asserting party puts the privileged
21 information at issue”; and (3) “whether allowing the privilege would deny the opposing
22 party access to information vital to its defense.” *United States v. Amlani*, 169 F.3d 1189,
23 1195 (9th Cir. 1999) (internal quotation marks and citations omitted). Because the
24 attorney-client privilege is typically used as a shield to protect against disclosure, implied
25 waiver prevents a party from using attorney-client privilege as both a shield and a sword
26 (by taking an affirmative act). *See Sanmina Corp.*, 968 F.3d at 1117.

27

28 ⁴ There is no argument that the NCAA expressly waived the attorney-client privilege.

1 The Court's analysis first focuses on whether the NCAA has affirmatively put its
2 attorney-client communications or lawyer's performance at issue, before turning to
3 whether permitting assertion of the privilege would be fair. Here, the NCAA did not take
4 an affirmative act to put its privileged attorney-client communications at issue, or, in
5 other words, put its lawyer's performance at issue. See *Sanmina Corp.*, 968 F.3d at
6 1117; *Amlani*, 169 F.3d at 1195. The NCAA's assertion of pro-competitive reasons for
7 the Volunteer Coach Rule (or its repeal) does not put its counsel's legal advice or its
8 privileged communications with counsel at issue. The fact that pro-competitive reasons
9 necessarily implicate the NCAA's state of mind or its intent, does not equate to the
10 NCAA putting its attorney-client privilege or its outside counsel's performance at issue.
11 The cases upon which Plaintiffs rely are distinguishable on this basis. See *Joint Disco*.
12 Stmt at 12-14 (citing, e.g., *Olvera v. County of Sacramento*, 2012 WL 273158, at *4 (E.D.
13 Cal. Jan. 30, 2012) (finding implied waiver where defendants asserted good faith
14 defense based on their "subjective and allegedly reasonable evaluation of the relevant
15 facts and the law").

16 Another problem with Plaintiffs' argument is that under a logical application of
17 Plaintiffs' rationale, an implied waiver of the attorney-client privilege occurs when an
18 antitrust defendant in a Sherman Act § 1 case asserts pro-competitive reasons for the
19 challenged restraint, which occurs in almost every Section 1 case as part of the rule of
20 reason analysis.⁵ Plaintiffs were not able to identify, and neither was the Court, any
21 cases where an implied waiver of the attorney-client privilege occurred in a similar
22 context from the defendant's assertion of a pro-competitive rationale. See *Joint Disco*.
23 Stmt. While there very well may be a situation where an implied waiver of the attorney-
24 client privilege by an antitrust defendant asserting a pro-competitive rationale occurs, it
25 has not occurred here. The Court therefore concludes that the NCAA has not implicitly

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⁵ At this stage of the litigation, the Court recognizes that neither side concedes the level
27 of analysis applicable for this Section 1 claim (i.e., per se, quick look, or full rule of
28 reason), and the Court's analysis here does not presume or apply a specific type of
analysis.

1 waived its attorney-client privilege.

2 **III. CONCLUSION**

3 In conclusion, IT IS HEREBY ORDERED that:

4 1. Plaintiffs' motion to compel (ECF No. 129) is DENIED; and

5 2. The Clerk of the Court is directed to update the short case title in the

6 docket to *Ray, et al. v. NCAA*.

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8 Dated: April 14, 2025


9 CHI SOO KIM
10 UNITED STATES MAGISTRATE JUDGE

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